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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

VAN KIM LAI, Plaintiff and Appellant, v. NGUYET NGUYEN et al., Defendants and Respondents.	G050947 (Super. Ct. No. 30-2011-00527755) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, David T. McEachen, Judge. Affirmed.

Van Kim Lai, in pro per., for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

* * *

The trial court granted defendants Nguyet Nguyen's and Khanh Lai's motion to set aside a default judgment under Code of Civil Procedure section 473,

subdivision (d) (all statutory references are to this code unless otherwise stated). The court found the judgment was void due to improper service of the summons. As we explain, substantial evidence supports the trial court's finding of improper service. Accordingly, we affirm the order.

I

FACTS AND PROCEDURAL HISTORY[1]

In December 2011, plaintiff Van Kim Lai (Lai) filed a complaint in propria persona for damages against her brother Khanh Lai (Khanh), their sister Chau Lai (Chau), and Khanh's wife Nguyet Nguyen (Nguyen). The complaint contained causes of action for breach of contract, common counts, fraud, and conspiracy. Lai alleged defendants "sold [real] property [the Toddy Street property] without [Lai's] knowledge," "did not pay [Lai] any money," and kept "the proceeds to themselves," resulting in damages of $350,000. Proofs of service were not filed until June 2013. Barbara Tustison, a registered process server, claimed in her declaration she served all three defendants by substituted service on "Khiem Lai/ Adult Co-Occupant" on October 9, 2012 at "4418 Oakfield Ave, Santa Ana, CA 92703." Tustison's declaration also asserted this was the abode or usual dwelling house of the defendants.

Chau retained counsel and demurred, but Khanh and Nguyen did not respond to the complaint. On May 7, 2013, the court sustained the demurrer with 10 days leave to amend.

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[1] Appellant Lai's clerk's transcript is incomplete and omits documents potentially relevant to the appeal. Accordingly, we hereby judicially notice the superior court file in this matter and augment the appellate record with it. No respondent brief has been filed. "[W]e do *not* treat the failure to file a respondent's brief as a 'default' (i.e., an admission of error) but examine the record, appellant's brief, and any oral argument by appellant to see if it supports any claims of error made by the appellant. [Citations.]" (*In re Marriage of Riddle* (2005) 125 Cal.App.4th 1075, 1078, fn. 1.)

On May 17, 2013, Lai filed a first amended complaint (FAC). The FAC restated and added causes of action, and included a claim for punitive damages.

In June 2013, Chau demurred to the FAC. On July 23, 2013, Lai filed a proof of service reflecting process server Tustison personally served the summons and FAC on Nguyen on June 28, 2013, at 3:00 p.m. at "1508 E Lincoln Ave, Orange, CA 92865." On August 8, 2013, Lai requested, and the court clerk entered, default against Nguyen. Jane Baldwin, the declarant, stated a copy of the request was mailed to Nguyen at the Lincoln Avenue address on August 8, and on that same date Lai filed a proof of service reflecting Tustison, on July 29, 2013, at 11:00 a.m., personally served the summons and FAC on Khanh at "4418 Oakfield Ave, Santa Ana, CA 92703."

On August 13, 2013, the trial court sustained in part and overruled in part Chau's demurrer and gave Lai 10 days to amend.

On August 23, 2013, Lai filed a second amended complaint (SAC), which generally tracked the FAC and requested the same compensatory and punitive damages. On September 12, Lai filed a proof of service reflecting an Albert Casaquit mailed the SAC (but no summons apparently) to Khanh at 4418 Oakfield on August 23.

On September 20, 2013, Lai filed a case management statement asserting all named parties had been served, appeared, or had been dismissed. It noted the court had entered default against Nguyen.

On September 25, 2013, Lai requested, and the clerk entered, default against Khanh. At the case management conference in December 2013, the court scheduled a trial for May 5, 2014.

On February 18, 2014, the court rejected Lai's attempt to file a request for a default judgment against Nguyen because Nguyen had not been defaulted on the SAC. On February 28, Lai filed a proof of service reflecting Casaquit mailed the SAC (no summons apparently) to Nguyen at the Lincoln Avenue address on February 27, 2014.

On February 19, 2014, Lai filed a request for default judgment against Khanh seeking $395,000 in damages. Baldwin, the declarant, stated she mailed the request on February 17 to Khanh at the Oakfield address. Lai's declaration accompanying the request asserted Khanh had failed to respond although he had been personally served with the original complaint and FAC, and also served with the SAC.

On February 28, 2014, Lai filed a memorandum to set a prove-up hearing. The court clerk set the hearing for early April 2014. Casaquit mailed notice to Khanh at Oakfield, and to Chau's attorney.

On April 2, Lai requested, and the clerk entered, Nguyen's default to the SAC. Baldwin declared she mailed the default request on April 2 to Nguyen at the Lincoln Avenue address. On April 3, Lai requested a default judgment against Nguyen in the amount of $500,000. Baldwin declared she mailed the default judgment request on April 3 to Nguyen at the Lincoln Avenue address.

A minute order reflects the trial court conducted a default prove-up hearing on the SAC on April 9, 2014. A witness, Khoa Lai, testified, and the court admitted various exhibits and considered Lai's declaration. Lai advised the court she would dismiss Chau from the case if the court entered a judgment against Khanh and Nguyen. The court found in favor of Lai against Khanh and Nguyen, and awarded damages of $395,000. The court dismissed Chau without prejudice and signed a formal judgment on April 9, 2014.

Approximately six weeks later, on June 20, 2014, Khanh and Nguyen, represented by counsel, moved to set aside the default judgment and defaults. On July 22, 2014, the court denied defendants' motion to set aside without prejudice.

In September 2014, defendants filed a second or renewed motion to set aside the default judgment and defaults. Among other claims, they argued the judgment was void because Lai did not properly serve the summons and complaint.

Nguyen filed a declaration denying she was personally served with the summons and FAC on June 28, 2013, at the Lincoln Avenue address. This was the address of a nail salon (Bella Nails) she owned in part. But she worked full time during the day elsewhere, and would have been at work when the summons was allegedly served. She provided paycheck stubs and a letter from the human resources manager of her Irvine employer. She never authorized any of the independent contractor manicurists, who had a limited understanding of English, to accept service of any summons, and she had no actual knowledge of Lai's lawsuit until May 5, 2014. She noted the proof of service did not describe the person allegedly served.

Nguyen also submitted a declaration from Cuong "Brian" Truong, the former manager of the nail salon. Truong was authorized and would have received process on Nguyen's behalf, but he had no recollection of being served with process for Nguyen. He and the manicurists knew Nguyen as "Regina" Nguyen (the summons and complaint used "Nguyet" Nguyen) and he believed manicurists receiving any papers would have discarded those not addressed to "Regina" Nguyen. Truong also collected mail from a general mail box at the mall where the salon was located, and if he did not recognize the name on a piece of mail he would leave it for return to the mail carrier. He did not recall seeing court or legal papers for Regina or Nguyet Nguyen.

Khanh submitted a declaration denying he was personally served with the summons on July 29, 2013, and denying actual knowledge of the lawsuit. Khanh stated he had not lived at the Oakfield address since July 2003. He, Nguyen, and their children had lived in Huntington Beach since December 2012. He worked and would not have been home on Monday at 11:00 a.m. when the summons was allegedly served. He never authorized anyone to accept service on his behalf, and first learned about the lawsuit around May 5, 2014, when Nguyen discovered the lien on her business.

Lai opposed the motion. She filed declarations stating assessor records reflected Khanh owned the Oakfield property and received mail there. She also relied on

process server Tustison's declarations that she personally served Khanh and Nguyen.[2] Lai also submitted a second declaration from Tustison dated October 17, 2014. Tustison stated she met Nguyen at the Lincoln Avenue address on June 28, 2013, at 3:00 p.m., she confirmed Nguyen's identity, and Nguyen accepted the summons and FAC. Tustison had also served Nguyen with a summons and complaint in another case at the Lincoln Avenue address on September 29, 2014, at 3:45 p.m. Tustison stated the person she served on June 28, 2013, and September 29, 2014, was the same person. Tustison stated she served Khanh on July 29, 2013, at the Oakfield address and confirmed his identity.

Lai also submitted a declaration from sibling Khoa Lai who stated Khanh told him and other relatives to "keep a secret" about the sale of the Santa Ana residence on Toddy Street where Khanh and Nguyen formerly resided and which was the subject of the lawsuit. Khoa asserted Lai did not know where the couple lived as a result. Khoa also stated Khanh and Nguyen often brought their children to the Oakfield residence so the grandmother or aunt could care for them during work hours. According to Khoa, Khanh and Nguyen knew about the lawsuits involving the Toddy Street property, as did other family members at the Oakfield residence because Khanh and Nguyen visited and complained about the lawsuits. Khoa asserted Khanh and Nguyen hired Chau's attorneys. Khanh often spent his lunch break at the Oakfield residence between 11:00 a.m. and 1:00 p.m., and used the Oakfield address to receive bills, other mail, and court papers.

A minute order dated October 21, 2014, reflects the court granted the motion to set aside the default judgment: "The Court having fully considered the

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[2] Lai also complained Truong, Nguyen, and Khanh had not signed their declarations. Defendants filed their unsigned declarations electronically. California Rules of Court, rule 2.257 provides, "By electronically filing the document, the electronic filer certifies that" the "declarant has signed a printed form of the document" and "that the original, signed document is available for inspection and copying at the request of the court or any other party."

arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows: . . . [¶] Defendants [Khanh and Nguyen's motion] . . . is GRANTED under CCP § 473(d). [¶] Defendants have sufficiently established that they were not personally served with the summons and complaint, and did not receive actual notice of this lawsuit until May 5, 2014. [Citing defendants' declarations]." The court explained it had discretion in deciding a motion seeking relief from default, and there was a strong policy favoring trial on the merits. The court vacated the judgment and the defaults and allowed defendants until November 21, 2014, to file their answers. Lai appealed from the order after judgment. (Code Civ. Proc., § 904.1, subd. (a)(2).)

II

DISCUSSION

Lai contends the trial court "erred in finding [defendants] provided sufficient evidence to support excusable neglect claim, when there is no such evidence to support that finding. In fact, [defendants] misrepresented facts to the court. Therefore, [defendants] are not entitled to relief under" section 473, subdivision (d). She also asserts she met her burden of proof when she served defendants and they had knowledge of the lawsuit, but they "provided false testimonies to the court to induce" it "into vacating the default and default judgment . . . ."[3]

Contrary to Lai's claim, the court did not set aside the default judgment because of excusable neglect (see § 473, subd. (b)). Rather, the court set aside the judgment as void under section 473, subdivision (d), which provides in relevant part: "The court . . . may, on motion of either party after notice to the other party, set aside any void judgment or order."

"'"Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the

[3] Lai has elected to proceed without a reporter's transcript of the proceedings.

subject matter *or the parties.*"' [Citation.] 'When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and "thus vulnerable to direct or collateral attack at any time."' [Citation.] [¶] A motion to vacate a void judgment is a direct attack. [Citations.] '[O]n direct attack, lack of jurisdiction may be shown by extrinsic evidence, i.e., evidence outside the judgment roll.'" (*Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1249 (*Strathvale*); *Rogers v. Silverman* (1989) 216 Cal.App.3d 1114, 1121-1122 ["motion for relief from a judgment valid on its face but otherwise void for improper service" must be filed no later than two years after entry of default judgment]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) [¶] 5:491, p. 5-133; 8 Witkin, Cal. Proc. 4th ed 1997, Attack on Judgment § 11, p. 518.)

"'The gist of the "substantial evidence" rule is: [¶] "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . ." [Citations.] [¶] 'So long as there is "substantial evidence," the appellate court *must affirm* . . . even if the reviewing justices personally would have ruled differently had they presided over the proceedings below, and even if other substantial evidence would have supported a different result. Stated another way, when there is substantial evidence in support of the trial court's decision, the reviewing court has *no power to substitute its deductions*.'" (*Rupf v. Yan* (2000) 85 Cal.App.4th 411, 429-430, fn. 5.)

"[C]ompliance with the statutory procedures for service of process is essential to establish personal jurisdiction. [Citation.] Thus, a default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void." (*Dill v. Berquist Construction Co.*(1994) 24 Cal.App.4th 1426, 1444.)

Actual notice of the action is not a valid substitute for proper service of process. (*Id.* at p. 1439, fn. 12.)

"'A motion to vacate a default and set aside [a] judgment (§ 473) "is addressed to the sound discretion of the trial court, and in the absence of a clear showing of abuse . . . the exercise of that discretion will not be disturbed on appeal.'" [Citations.] The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. [Citation.}"(*Strathvale, supra,* 126 Cal.App.4th 1241, 1249.) "When a defendant challenges the court's personal jurisdiction, the plaintiff has the initial burden of 'demonstrating facts justifying the exercise of jurisdiction.' [Citation.] 'When there is conflicting evidence, the trial court's factual determinations are not disturbed on appeal if supported by substantial evidence.'" (*Id.* at p. 1250.)

Section 415.10 et seq. lists the methods to serve individuals with summons, including, as relevant in this case, personal delivery to the defendant or the defendant's agent authorized to accept service (§ 415.10), and substituted service at the defendant's usual place of abode, usual place of business, or usual mailing address, after personal service has been diligently attempted (§ 415.20).

Filing a proof of service that complies with statutory standards creates a rebuttable presumption of valid service. (§§ 417.10, 417.40 [process server's declaration must show time and place where summons and complaint delivered to defendant and registered process server's information]; *Floveyor Internat., Ltd. v. Superior Court* (1997) 59 Cal.App.4th 789, 795.) But when the defendant challenges the court's personal jurisdiction because of improper service, the plaintiff bears the burden of establishing facts requisite to valid service of process. (*Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 413.)

Here, substantial evidence in the record establishes Lai did not personally serve the SAC on defendants. Khanh and Nguyen presented evidence that Lai's purported mail service did not comply with statutory standards for service of process and

therefore the court did not acquire jurisdiction over the defendants based on mailing of the SAC.

In the trial court, the parties and the court focused on service of the summons and the FAC. If the summons and FAC were properly served, and the SAC did not substantively change the allegations of the FAC,[4] then proper service of the FAC presumably sufficed to bestow jurisdiction to render a default judgment based on the SAC against defendants.

Here, the trial court was presented with conflicting declarations concerning service of the summons and FAC on defendants. The court relied on Khanh's and Nguyen's declarations, referenced above, reflecting they did not personally receive copies of the summons and FAC. Lai did not offer any evidence other than process server Tustison's declarations to establish she in fact personally served defendants, nor did Tustison explain how she confirmed the identity of the persons served. Defendants' declarations constitute substantial evidence to affirm the trial court's order granting the motion to set aside the default judgment. We discern no error or abuse of discretion.

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[4] An amended complaint that makes substantive changes (for example, increasing the damages demanded or adding a new cause of action on a different legal theory) supersedes the original complaint and "'opens'" the default. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) [¶][¶] 5:9.5, p. 5-4; 5:64, 5:65, p. 5-17; 6:698, p. 6-191.) The plaintiff must serve the amended complaint on the defendant, and the defendant is entitled to respond. (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1743; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) [¶] 5:9.5, p. 5-4.) One treatise explains: "Although there is no known case authority, the test for what is and is not a 'substantive change' should focus on whether the correction or addition might give rise to any *different amount or form of liability, or indicate the existence of any defense or ground for avoiding liability, not reasonably disclosed in the original complaint*." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) [¶] 6:701, p. 6-192.) However, "mere typographical errors, or correction of names or places, usually can be made without waiving prior default entries." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) [¶] 6:700, p. 6-192.)

III

DISPOSITION

The order is affirmed. Because prevailing respondents did not appear in this court, no appellate costs are awarded.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P.J.

THOMPSON, J.